CRIMINAL APPEAL NO. 744 OF 1988.

Date of decision: 12-2-1996.

For approval and signature

The Honourable Mr. Justice R. R. Jain

and

The Honourable Mr. Justice H. R. Shelat

Mr. Z.N. Shaikh, advocate for appellant.
Mr. M.R. Gehani, advocate for respondents.

1. Whether Reporters of Local Papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether their Lordships wish to see the fair copy of judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

Coram: R.R.Jain & H.R. Shelat, JJ.

12th February 1996.

Oral judgment (CAV): (Per Jain, J.)

The appellant/original accused was charged and convicted for commission of offence punishable under Section 20 (b) (ii) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act' for the sake of convenience and brevity) and was sentenced to rigorous imprisonment for ten years and also to pay fine of Rs. 1 lac, in default, to undergo further rigorous imprisonment for one year.

The incident occurred on 8.7.1987 in public place, viz., on the main road, near Jamalpur Pagathia, in the City of Ahmedabad. According to the prosecution, on 7.7.1987 the complainant, P.W.1., Mr. N.B. Rohit, Superintendent of Customs (Preventive), Customs House, Navrangpura, Ahmedabad, received secret information that a youngman, named Intezarahmed Sultanahmed Shaikh, aged about 25 to 28 years, is dealing in sale of contraband drugs, that is, Charas, in Jamalpur area and on the next day, that is, on 8.7.1986, is likely to carry between 11.30 A.M. to 12.30 P.M. The information was reduced in writing and then necessary instructions were given to his subordinates i.e., Inspectors for keeping a watch at the time and place disclosed and do needful to intercept the accused. Accordingly, Inspectors kept watch at the time and place revealed from the information and ultimately caught hold of the appellant with some suspected contraband substance. Thereafter he was taken to the office and presented before the complainant, that is, Superintendent of Customs (Preventive), who, in turn, searched him in presence of Panchas and having found contraband, needful was done and ultimately private complaint was lodged in the Court of Chief Metropolitan Magistrate, Ahmedabad being Inquiry Case No.50/87. The learned Magistrate, on inquiry, having found that the case is exclusively triable by the Court of Sessions, committed to the Court of Sessions, City of Ahmedabad, where same was numbered as Sessions Case No.257 of 1987, the trial of which resulted in conviction as stated above.

Learned advocate Mr. Z.N. Shaikh for the appellant has attacked the judgment on following points:

1. Violation of mandatory provisions,
2. Panchas were not selected from the locality and, therefore, creates doubt about the genesis of the occurrence; in other words, alleges false implication,
3. The entire investigation is not reliable.

Relying upon the landmark judgment of the Supreme Court in the case of State of Punjab v. Balbir Singh, reported in (1994) 3 SCC 299, Mr. Shaikh has argued that violation of mandatory provisions go to the root of the merits of the case and vitiates the trial and, therefore, the accused should not have been convicted. We are in respectful agreement with the broad principles laid down in the judgment in case of Balbir Singh (supra), but the question is whether on facts and material placed before the Court can we say that mandatory provisions are

violated? In order to appreciate this contention, we will have to appreciate the evidence in light of mandate contained in each of the sections.

Section 42 of the Act deals with power of entry, search, seizure and arrest without warrant or authorisation. It speaks of empowered officers being an officer superior in rank to a peon, sepoy or constable to enter into and search any building, conveyance or place or break open in case of resistance to seize and detain, provided he has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender. Sub Section (2) of Section 42 provides that when information about commission of offence is received in advance, it is mandatory on the part of the officer to take down and send a copy thereof to his immediate official superior without any delay. Mr. Gehani, learned advocate for the respondents, has taken us to Ex.16, which is a copy of note sheet wherein the information received by the complainant, P.W.1, was reduced in writing and then shown to his immediate superior officer, that is, Assistant Collector of Customs and got initialed by him. Mr. Shaikh has argued that under the Customs Act, such information is required to be reduced in writing in D.R.I Form and as the same is not reduced in writing in D.R.I Form, is no more an information duly reduced or taken down in writing. The contention of Mr. Shaikh does not appeal to us since the law does not prescribe any particular mode, manner and method of taking down the information. Only thing required under law is that the information received is required to be taken down, may be in any form, in any register, in any book or even on a sheet of paper. This is just with a view to avoid mischief being played by any person against the accused because the law provides for very harsh and stringent punishment and by providing for taking down and forwarding the information, the law ensures that the information has been brought to the notice of the superior officer and he is fully made aware so that may keep a check on further investigation and have a check on mischief being committed by any of his subordinates. D.R.I form is a part of record to be maintained under Custom Act. This is just for administrative convenience and discipline and, therefore, has nothing to do with investigation under the Act which does not provide for any specific form. P.W.1 has in clear terms thrown enough light on this aspect and clarified in cross-examination. Hence, failure to maintain D.R.I form can never be fatal. The law further requires that a copy of such information shall also be

forthwith sent to his immediate official superior. In this case, from Ex.16, it is evidently clear that immediately after reducing in writing, the information was placed for perusal of his superior officer, that is, Assistant Collector, who took note of it and duly put his initial on 7.7.1987. The complainant, P.W.1, has categorically stated that after reducing the information in writing was shown to his immediate superior officer, that is, Assistant Collector on the same day, who, as a token of perusal, put his initial and signature. Nothing has come on record that the Assistant Collector is not the immediate official superior of the complainant or that the information reduced in writing was not at all shown to the Assistant Collector. Virtually, this fact has gone unchallenged in cross-examination by the appellant. Of course, law provides for sending a copy of the message. Such copy is to be sent where the immediate superior officer is not available at the same place. If the information is shown personally and got initialed then it is much more than sending of copy. Copy is to be sent only for the purpose of keeping the superior officer informed about the matter. Superior Officer can be kept informed either by sending a copy in writing or even personally showing the information reduced in writing with a request to read. To apprise superior officer in person is much more full proof than sending a copy for the purpose of complying with mandate. We are of the view that oral evidence, which is otherwise not unreliable and untrustworthy, about communication of information is due compliance of mandatory provisions. In this case, office of the Assistant Collector is also situated in the same premises and, therefore, the complainant, that is, Superintendent of Customs (Preventive) immediately, after reducing the information in writing, informed his immediate superior officer and thus duly complied with the mandatory provisions of law.

It cannot be gainsaid that the Inspectors who kept watch at the public place are not only authorised but are also the empowered officers under Sections 41, 42, and 53 of the Act as is evident from the notifications issued by Ministry of Finance, Department of Revenue, Notification No. S.O.822 (E), 823 (3) and 824 (E) dated 14.11.1985 published in Gazette of India, Extra Part II, Section 3 (ii) dated 14.11.1985. Vide these notifications, officers of the rank of Inspector and above are empowered under Sections 41, 42 and 53 of the Act. Since the complainant who is holding the post of Superintendent of Customs and is in rank above the rank of Inspector, is also duly empowered officer and as held by the Supreme Court in Balbir Singh's case (supra) the empowered

officer is not required to record reasons for his belief under Section 43 of the Act. Section 43 also does not mention about the empowered officer having prior information given by any person about recording the same. Thus, though Section 43 does not cast duty upon the empowered officer to record the information, yet, in this case, it has been recorded and is duly shown and transmitted to immediate superior officer.

Mr. Shaikh also contends about violation of Section 50 of the Act. This Section speaks of affording opportunity to the accused for being searched in presence of any Gazetted Officer or Magistrate. The mandatory provision of this Section is required to be complied with only when an authorised or empowered officer not being a gazetted officer carries search. While acting under Sections 41, 42 and 43 if the person to be searched requires and if such requisition is made by the person to be searched in presence of a gazetted officer or magistrate, the empowered/authorised officer concerned may detain him until he could produce him before such gazetted officer or Magistrate. In this case, the watch was kept by the Inspectors, duly empowered and authorised under Sections 41, 42 and 53 of the Act. After detention from the public place the accused was taken to the office and produced before the Superintendent of Customs, a gazetted officer, as is evident from the testimony of P.W.1, Ex.7, and then was searched in presence of panchas. On this point we find unchallenged evidence. Therefore, undisputedly the search was made in presence of a gazetted officer. Thus one can say that the mandatory provision of Section 50 of the Act is duly followed in its letter and spirit. After detention, the accused was immediately taken before the Gazetted Officer, who had searched him and, therefore, question of asking such person/accused for taking him to gazetted officer or Magistrate before being searched does not arise. A gazetted officer may be from any department. Even may be from the department of the agency carrying out investigation.

In the facts and circumstances of the case, we also find that the mandatory provisions of Sections 52 and 57 of the Act are also duly complied with in its letter and spirit. Section 52 of thee Act requires that as soon as the accused is arrested, he shall be informed of the grounds of his arrest and then such person alongwith articles seized is forwarded without any delay to the officer empowered under Section 53. In this case, it is evident from Ex.16, note sheet as well as evidence of P.W. 1 that on 8.7.1987 the accused was detained for

interrogation and then was also summoned to report on 9.7.1987 so as to further continue the interrogation. On 9.7.1987 the complainant having reasonable belief about commission of offence by the accused was arrested and then was immediately produced before the learned Chief Metropolitan Magistrate alongwith the articles seized and then by the order of court, the accused was remanded to Judicial Custody and the muddamal was kept with the department on behalf of the court and thus on 10.7.1987 the muddamal articles were handed over to Customs Godown for safe custody. The Customs Godown thus was holding muddamal articles on behalf of the court. Clause (b) of sub-section (3) of Section 52 requires that after arrest such person and article if forwarded to the officer empowered under Section 53, the provisions shall be deemed to have been complied. As discussed above, officers in the rank of Inspector and above are duly authorised under Section 53 of the Act and, therefore, had the accused and muddamal been kept with complainant, then also the provisions could deemed to have been complied with, yet, to be on safer side, the department took extra care and caution and produced the accused before the Magistrate in due compliance. Further, under Section 53, the person making arrest and seizure is also required to forward his report of arrest and seizure within 48 hours of arrest, to his immediate superior officer. From Ex.16, note sheet as well as unshaken evidence of P.W.1, it is evidently clear that on 11.7.1987 the relevant particulars of arrest and seizure were prepared in Form F and forwarded with letter addressed to D/G. MCB., New Delhi and copy to D.D., MCB, Bombay and D.G.C.C.I. & D.D.R.I, Surat. Not only this, but the said papers were also put before the Assistant Collector (Preventive) for perusal, who, as a token of perusal, has also put his signature. The Assistant Collector being immediate superior officer of the complainant, his perusal of paper shall be deemed to have been due in compliance of Section 57, yet, as an extra caution, the said papers were forwarded to all other superior officers in the hierarchy at different places, that is, Delhi, Bombay and Surat. The arrest was made on 9.7.1987 and the papers were forwarded on 11.7.1987. Section obligates to forward report of arrest and seizure to immediate superior officer, may be having his office in same premises. If he is apprised, will be due compliance. It is not necessary that should be forwarded to other superiors in the hierarchy. Therefore, we find due compliance of Section 57 of the Act.

The prosecution has also placed on record Ex.11, a copy of the arrest memo which was duly served on the accused

on 9.7.1987, that is, the day of arrest. Ex.11 is a copy of the arrest memo in English whereas Ex.12 is the translated version in Hindi. It is the case of the prosecution that as the accused was not able to read and understand English as was knowing Hindi only, he was explained the contents of Ex.11 and yet a translated version in Hindi at Ex.12 was also served upon him. On this point we do not find serious challenge by the accused and, therefore, the prosecution shall be deemed to have been satisfactorily complied the provisions of Section 52 of the Act. Thus, on overall consideration, we find that all the mandatory provisions of the Act are duly complied with.

The next contention raised is about selection of independent panchas. Mr.. Shaikh has contended that the public place from where the accused was detained is thickly populated and even a judicial note can be taken about it. Therefore, as contended, it was incumbent upon the prosecution to select any of the panchas from that vicinity only. As regards Panchas, what is required under law is selection of independent panchas so as to inspire confidence about unbiased investigation. Normally panchas should be selected from the same locality only but again having regard to the facts and circumstances and exigency, if panchas are selected from any other locality is not illegality and, therefore, cannot vitiate the prosecution. There is nothing wrong if the panchas are selected from other area but the only thing is that such panchas should be respected persons having reputation. The panch witness should not be of particular choice of Investigating Agency. When the witness is not from same vicinity then the only requirement to be satisfied is that the presence of such persons at the time and place of selection/summoning should be natural. In this case, since the officers were to act on previous information and the operation was to be done so swiftly without giving any chance to the accused to destroy evidence or to facilitate escape it was necessary for the prosecution to select well in advance an independent person as panch. From the evidence of P.W.3, Ex.19, it is evident that on 8.7.1987 at about 10 O' clock, the witness, Panch, was standing on main road, talking with his friend having tea stall. At that time he was called by Custom Officer and was explained to remain as panch witness. Initially he showed resentment but on being persuaded he expressed his willingness and went with the officer at the place and then the entire proceedings were completed in presence of said Panch witnesses. There is nothing on record to suggest that the witness is a professional panch witness

or known to the Custom Officers or is having any inmical terms with accused so as to doubt false implication of the accused. The Panch witnesses are independent and their presence at the time and place of selection/summoning is natural and, therefore, is in accordance with law. In this view of fact, we do not find any irregularity in selection of panchas and hold that the panchas are independent and are in compliance of provisions of Criminal Procedure Code as well as the Act.

Lastly a lame attempt has been made by the learned advocate for the appellant, Mr. Shaikh, that the entire investigation is unreliable and untrustworthy and, therefore, cannot be relied upon. But, Mr. Shaikh has failed to point out any lacuna in investigation, evidence or circumstance which may create doubt about prosecution case. In this case, it has come on record that the investigating agency acted upon previous information which was acted in compliance of all the mandatory provisions of the Act as discussed above and the prosecution case has been proved by concrete and cogent evidence and independent witnesses. We do not find any substance that the case has been falsely foisted upon the accused. There is nothing on record that the officers of the investigating agency as well as Panch witnesses were to settle score with accused and, therefore, was falsely implicated. When an agency acts independently without having any personal interest and in due discharge of official act and duties, we have no reason to cast any doubt that the investigation is biased and partial. When an agency acts in natural course in discharge of official duty, we find no reason for false implication of accused and that too also for such a huge quantity, i.e., 1325 gms. of Charas. If at all a false case was to be made, then could have been made with smaller quantity also. Thus, in totality, we do not find any substance in this last contention also. We find that the evidence on record is cogent, concrete and trustworthy and, therefore, the learned trial Judge was absolutely right in appreciating in its proper perspective and holding the accused guilty for the offence charged.

With this, we find no reason to disturb the judgment and order of conviction and sentence. The appeal is devoid of merits and, therefore, is dismissed. Muddamal article is ordered to be disposed of in accordance with the order of trial Court.